

# ***FINDINGS AND OPTIONS FOR COMMITTEE ACTION***

## **Finding 2 -- Board Accountability**

Need to provide homeowners with better recourse when seeking to challenge actions by HOA Boards

- Committee received complaints concerning flagrant violations of the applicable statutes and/or HOA bylaws (failing to give required notice of meetings, holding meetings in secret, failing to provide records to homeowners when requested, unauthorized use of association funds, and arbitrary enforcement of covenants)
- Only recourse currently available to homeowners in most cases is to commence a civil action, which is cost prohibitive for many homeowners and also puts the homeowner in the position of having to pay to pursue the litigation and at the same time funding the Board's defense

## **Finding 5 – Consumer Protection**

Need for additional consumer protections to better protect homeowners from abusive HOA practices

- Complaints received about unreasonable actions by boards include: arbitrary enforcement of covenants, excessive fines and attorney's fees, refusal to hold fair and open elections of officers, abuse of the foreclosure process, and failure of the law to give homeowners enough rights to challenge the actions of HOA Boards
- Boards can legally adopt and amend rules and regulations, make contracts and incur liabilities on behalf of an association, cause additional improvements to be made as part of the common elements and assess homeowners for those improvements, and such actions are often taken without giving notice or an opportunity to vote to homeowners.

**Options to address issues concerning Board Accountability (Finding 2)/ Options to address issues concerning Consumer Protection – (Finding 5), include:**

- ***Adopt the Uniform Common Interest Owners Bill of Rights Act. (UCIOBORA).***

In 2008, the Uniform Law Commission (the “ULC”) promulgated a free-standing and relatively short Uniform Act that addresses all of the ‘association versus unit owner’ issues touched on during the drafting of the 2008 Uniform Common Interest Ownership Act (UCIOA) amendments. The free-standing

Act is known as the Uniform Common Interest Owners Bill Of Rights Act or "UCIOBORA". Highlights of the UCIOBORA are:

Powers and duties of a unit owners association and the executive board are outlined.

Treatment of association bylaws, rulemaking, operation and governance, notice methods, unit owners and board meetings, and meeting and voting procedures are also provided, as are governing provisions for the adoption of budgets and special assessments.

UCIOBORA encompasses the authority to discipline unit owners, within limits, for failure to pay assessments, and the executive board of a unit owners association is given flexibility in determining whether to enforce the letter of each provision of its declaration, bylaws, or rules, or decline to enforce or compromise on such. The right of an association to proceed in foreclosure on a lien against a unit owner is revised and limited, and the act provides priority for the application of delinquent sums.

Record keeping requirements and guidance are provided in greater detail, and are drawn from FOIA requirements and other sources.

- ***Allow/Require Alternative Dispute Resolution*** -- Authorize or require that disputes between the association and unit owners or between two or more unit owners regarding the common interest community be submitted to nonbinding alternative dispute resolution as a prerequisite to commencement of a judicial proceeding. (see UCIOBORA § 8(a)(3)).

No similar provisions exist under the Condo Act or the Planned Community Act (PCA).

- ***Add provisions governing board discretion in enforcement.*** UCIOBORA sets forth a list of considerations a board must evaluate in a determination not to take enforcement action in a given situation. UCIOBORA § 8(b) provides:

(b) The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commencing an action for a violation of the declaration, bylaws, and rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(1) the association's legal position does not justify taking any or further enforcement action;

(2) the covenant, restriction, or rule being enforced is, or is likely to be construed as, inconsistent with law;

(3) although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(4) it is not in the association's best interests to pursue an enforcement action.

(c) The executive board's decision under subsection (b) not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

No similar provisions exist under the Condo Act or the PCA.

- ***Establish open meeting requirements.*** (UCIOBORA § 12). Among other things, UCOIBORA provides that meetings of HOA boards and committees must be open to unit owners, except during executive sessions (and specifies for what matters executive sessions may be held).

Provisions under the Condo Act (G.S. 47C-3-108) and the PCA (G.S. 47F-3-108) specify that meetings of an association must be held at least once a year and, at regular intervals, an executive board must provide lot owners an opportunity to attend a portion of an executive board meeting and to speak to the executive board about their issues or concerns.

- ***Enhance record-keeping requirements.*** UCIOBORA § 16 imposes significantly greater record-keeping requirements on HOAs than either the Condo Act (see G.S. 47C-3-118) or the PCA (see G.S. 47F-3-118). In addition to detailed financial records, UCIOBORA requires that minutes of all meetings, an association's organizational documents, as well as rules currently in effect be made available for examination and copying by a unit owner during reasonable business hours or at a mutually convenient time and location; and upon five days notice.

The Condo Act and the PCA provide that, at a minimum, the association must keep accurate records of all cash receipts and expenditures and all assets and liabilities, and must make an annual income and expense statement available to all lot owners – these records must be made reasonably available for examination by any lot owner. Further, an association, upon written request,

must furnish to a lot owner a statement setting forth the amount of unpaid assessments and other charges against a lot.

- ***Procedures for rules and assessments:*** Institute procedures a HOA must follow that prior to: (1) adopting, amending, or repealing any rule; or (2) adopting budgets or special assessment. (UCIOBRA §§ 17, 20).

No similar provisions exist under the Condo Act or the PCA with regard to rules or imposition of special assessments. Both do, however, specify processes that must be followed concerning adoption of association budgets (see G.S. 47C-3-103(c) and G.S. 47F-3-103(c)).

- ***Installment payments:*** Require an HOA to accept payment of outstanding balances from homeowners in installments

HOA ***may*** do so under current North Carolina law (see Condo Act (47C-3-116e2)) and PCA (47F-3-116(e2)).

- ***Punitive Damages:*** Allow imposition of punitive damages for a HOAs willful failure to comply with consumer protection provisions. (see UCIOBORA § 21).

No similar provisions exist under the Condo Act or the PCA.

- ***Mandatory Registration:*** Create mandatory registry of associations as provided in Article 5 of the Uniform Common Interest Ownership Act.

No similar provisions exist under the Condo Act or the PCA.

- ***State Oversight Agency:*** Create a new State-level agency or empower an existing one (Real Estate Commission) to register and oversee the activities of homeowner associations. Entity may have enforcement powers as provided in Article 5 of the Uniform Common Interest Ownership Act, or Virginia's Common Interest Community Board, or may serve only an informational/advisory role as with Virginia's Office of the Common Interest Community Ombudsman.

No State agency in North Carolina currently has responsibility for oversight of homeowner associations.

### **Finding 3 - Disclosure**

The committee found a need for greater disclosure by sellers of homes in planned communities concerning the restrictive covenants applicable to such real property.

- Complaints by homeowners in planned communities often appear to reflect a lack of awareness or understanding of the existence of restrictive covenants at the time they purchased their homes
- G.S. 47E-4 requires sellers of residential real property to furnish purchasers with a residential property disclosure statement, using a form developed by the Real Estate Commission ("REC"), which must include, among other things, "restrictive covenants affecting the real property." The current disclosure statement, however, only requires disclosure of **violations** of restrictive covenants

Options to achieve the goal of greater disclosure include:

1. Revising the Residential Property Disclosure Form developed by the REC pursuant to G.S. 47E-4 to require disclosure of HOAs and restrictive covenants;
2. Amending Chapter 47F, the Planned Community Act, to require sellers to provide prospective purchasers with specific information and documents relating to HOAs and the restrictions on the property being sold; and
3. Requiring that sellers provide prospective purchasers with general written information concerning HOAs and the types of restrictions that may be applicable to a home located in a planned community.

Each of these options is discussed more fully below.

#### **Option 1: Revise the Residential Property Disclosure Form to require sellers of property in planned communities to disclose the existence of HOAs and restrictive covenants**

The REC is statutorily required to develop the disclosure form that is mandated by G.S. 47E-4. Although the current statute can be read as requiring disclosure of covenants restricting the use of property, the current REC form provides a space only for disclosure of conditions that violate a restrictive covenant. There is no current requirement in the statute that the seller disclose the existence of a homeowners association.

The desired disclosure of the existence of restrictive covenants can be achieved either by: 1) formally requesting the Real Estate Commission to amend the disclosure form; or 2) amending G.S. 47E-4 to require the REC to make this change to the form.

Because there is no reference in G.S. 47E-4 to homeowners associations, a statutory amendment would be required to accomplish this disclosure.

In addition to revising the disclosure form, the disclosure requirement would be strengthened by:

- eliminating the option of making "no representation" currently permitted under G.S. 47E-4(a)(2) (only with respect to the new disclosure of HOAs and restrictive covenants)
- amend G.S. 47E-2(9), which currently exempts "the first sale of a dwelling never inhabited" from the disclosure requirements of G.S. 47E-4, to require the new disclosure of HOAs and restrictive covenants in first sales of dwellings never inhabited

**Option 2: Amend the Planned Community Act to require all sellers of property in planned communities to provide prospective purchasers with a copy of the declaration, covenants, bylaws, and the association rules and regulations.**

This is the approach taken by the Uniform Common Interest Ownership Act ("UCIOA"). Under the UCIOA, the unit owners association is required, upon request by a unit owner, to provide a certificate containing the information needed by the owner to make the required disclosures, and the association is permitted to charge the owner a reasonable fee for the preparation of the certificate. In the case of declarants or dealers, the UCIOA provides that "unless a purchaser is given the public offering statement more than 15 days before execution of a contract for the purchase of a unit, the purchaser, before conveyance, may cancel the contract within 15 days after first receiving the public offering statement." UCIOA Section 4-108(a). In the case of resales, "the purchase contract is voidable by the purchaser until the certificate has been provided and for [five] days thereafter or until conveyance, whichever first occurs." UCIOA Section 4-109(c).

Unlike the Planned Community Act, both the UCIOA and the North Carolina Condominium Act mandates full disclosure (including furnishing copies of the declaration, recorded covenants, and association bylaws, rules and regulations) in sales of condo units by a declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser. G.S. 47C-4-102(c). In the case of resales of units, however, the Condominium Act stops short of the UCIOA

requirement for disclosure, mandating only that the seller furnish a prospective purchaser with "a statement setting forth the monthly common expense assessment and any other fees payable by unit owners." G.S. 47C-4-109.

**Option 3: Require sellers to provide prospective purchasers with general written information concerning HOAs and the types of restrictions that may be applicable to a home located in a planned community.**

This objective could be achieved by amending the Planned Community Act to require sellers to provide prospective buyers of lots in planned communities with a brochure to be developed by the REC advising them in simple, understandable terms of basic powers of HOAs, examples of restrictions to which they may be subject, and how to obtain a copy of the governing documents containing the restrictions that apply to the property in question.

**Finding 4 - Declarant Transfer Issues**

The committee found that the law should be clarified with regard to the obligations of a declarant (developer).

- Complaints received concerning abuses by a declarant (refusing to transfer control to the homeowners, failing to pay assessments on declarant-owned property, failing to properly record amendments to the declaration, and failing to properly complete actions required of the declarant such as approved stormwater systems)
- Unlike the Condominium Act, the Planned Community Act does not limit the time period in which a declarant may maintain control of the association

Options to achieve the goal of clarifying the obligations of a declarant include adding language, which is already in the Condominium Act, to the Planned Community Act:

1. Specifying time limit for declarant control
2. Specifying obligations and liabilities of declarant who transfers declarant interest
3. Allowing homeowner association to terminate contracts and leases entered into by declarant during period of declarant control
4. Providing homeowner association with right of action and remedy against declarant for breach of contract or tort during period of declarant control

Each of these options is discussed more fully below:

**Option 1: Add language to the Planned Community Act (PCA) specifying the end of declarant control.**

Currently, the Planned Community Act merely states that the declaration may provide for a period of declarant control. (G.S. 47F-3-103(d)). In contrast, the Condominium Act in G.S. 47C-3-103(d) specifies when declarant control must end: "Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of (i) 120 days after the conveyance of 75% of the units (including units which may be created pursuant to special declarant rights) to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) two years after any development right to add new units was last exercised."

**Option 2: Add language to the Planned Community Act specifying the extent of the obligations and liabilities imposed upon a declarant who transfers his or her declarant interest in a lot or condominium to a third party.**

The Condominium Act in G.S. 47C-3-104 sets out the liability of transferor declarant when there is a transfer of any special declarant right.<sup>1</sup> The transferor declarant remains liable for any obligation or liability arising before the transfer. Also if the right is transferred to an affiliate of the declarant, the transferor remains liable.

**Option 3: Add language to the PCA allowing the association to terminate certain contracts and leases entered into by the declarant during the period of declarant control**

Currently G.S. 47F-3-105 merely allows the termination of contracts and leases entered into before the executive board elected by the lot owners takes office, if the contract or lease is not bona fide or was unconscionable to the lot owners. In contrast, the Condominium Act, in G.S. 47C-3-105, also expands the authority to terminate the following contracts and leases of the declarant: (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, and (2) any other contract or lease between the association and a declarant or an affiliate of a declarant.

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<sup>1</sup> The Planned Community Act and the Condominium Act define "special declarant rights" as rights reserved for the benefit of a declarant including, without limitation, any right (i) to complete improvements indicated on plats and plans filed with the declaration; (ii) to exercise any development right; (iii) to maintain sales offices, management offices, signs advertising the planned community, and models; (iv) to use easements through the common elements for the purpose of making improvements within the planned community or within real estate which may be added to the planned community; (v) to make the planned community part of a larger planned community or group of planned communities; (vi) to make the planned community subject to a master association; or (vii) to appoint or remove any officer or executive board member of the association or any master association during any period of declarant control. (See G.S. 47C-3-104 and G.S. 47F-1-103)



**Option 4: Add language to the PCA to provide the association or lot owners with a right of action and remedy against the declarant for losses to the plaintiff caused by the declarant's tort or breach of contract during the period of declarant control.**

Both the PCA and Condominium Act toll any statute of limitation affecting the association's right of action under this section until the period of declarant control terminates. However, the Condominium Act in G.S. 47C-3-111 (c ) and (d) also addresses the declarant's liability during a period of declarant control: If an action is brought against the association for a wrong that occurred during a period of declarant control and the association gives the declarant reasonable notice of, and an opportunity to defend, against the action, the declarant is liable to the association in either tort or contract. Specifically, the declarant is liable to the association for all tort losses suffered that are not covered by insurance carried by the association and all losses the association would not have incurred but for a breach of contract.<sup>2</sup> If the declarant is liable to the association it is also responsible for all litigation expenses including reasonable attorneys' fees incurred by the association.

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<sup>2</sup> However, G.S. 47C-3-111(c) does not impose strict or absolute liability upon the declarant for wrongs or actions which occurred during the period of declarant control.

## **Finding 6- Foreclosure Issues**

Current law authorizes homeowner associations to use power of sale foreclosure to recover unpaid assessments and judicial foreclosure to recover unpaid fines and fees. The committee found that there may be a need to prohibit or limit the use of foreclosure in all or some cases.

### **Options Concerning Foreclosure Issues:**

Currently, under both the Condominium Act (G.S. 47C-3-116) and the Planned Community Act (G.S. 47F-3-116), homeowner associations are authorized to file a claim of lien for any assessment that remains unpaid for a period of 30 days or more. Unless the declaration provides otherwise, fees, charges, late charges, and fines are enforceable as assessments.

If the debt securing the lien is based on fines, interest on fines or attorneys' fees resulting from fines, the association may only enforce the lien by use of judicial foreclosure. Associations may not seek to collect a service, collection, consulting, or administration fee unless the declaration expressly authorizes it and a lien secured by such a fee is also only enforceable by use of judicial foreclosure.

If the debt is for assessments for common expenses, the association may enforce the lien by use of the power of sale foreclosure statute. (Chapter 45, Art. 2A) Unlike judicial foreclosure, a power of sale foreclosure proceeding is held before the clerk of court and the clerk must sign a foreclosure order if there is evidence to prove only four factors: (1) a valid debt, (2) default in payment, (3) a legal right to foreclose, and (4) all owners have been served with notice of the hearing. No other issue may be considered in the proceeding. Once the clerk issues the order the property may be sold to satisfy the debt, in the same manner as a mortgage or deed of trust.

The following options to limit an association's authority to use foreclosure to enforce a lien have been recommended in the Uniform Common Interest Owners Bill of Rights Act:

1. The assessment must be at least 3 months past due and the unit owner has failed to accept or comply with a payment plan offered by the association.

***Under current law, the assessment need only be 30 days past due and the law contains a specific provision that neither the association nor the homeowner is obligated to offer or accept any proposed installment plan, although the executive board may agree to allow it.***

2. The executive board must vote to commence foreclosure against the specific unit.

***Current law does not specify the process used by the association to commence foreclosure against a specific homeowner.***

3. The association must apply any payments made by the homeowner first to unpaid assessments, then to late charges, then to attorneys' fees and other collection charges, and finally to unpaid fees, fines, interest, and late fees.

***Current law does not specify how payments must be applied, however, it does require that the association notify the homeowner in writing and by first-class mail that the balance due must be paid within 15 days of the mailing or the homeowner will also be liable for attorneys' fees and court costs. Attorneys' fees in an uncontested case are limited to \$1,200, not including costs or expenses.***

4. The association may not use foreclosure to enforce a lien resulting from unpaid fines and related sums, unless the association has obtained and perfected a judgment against the homeowner.

***Current law provides that a lien resulting from fines and related sums can only be enforced by judicial foreclosure, which would result in a judgment. North Carolina law appears to conform to this limitation.***

5. All aspects of the foreclosure must be commercially reasonable.

***Chapter 45, the Foreclosure statute, specifies the method for advertising, time, date, place, and terms of foreclosure proceedings and the sale of property.***

### **Finding 7 – Solar Access Issues**

The Committee received complaints from homeowners and heard from staff with the State Energy Office that there is some confusion with regard to the law that invalidates new restrictive covenants as well as city and county ordinances which prohibit installation of solar collector devices. Specifically concern was raised about an exception contained in the law that allows prohibitions on installation if the solar device would be visible from a roof slope or façade or if it faces a public access way. Reportedly this exception has been used by HOAs to exclude solar devices altogether.

#### **Options to address solar access issues (Finding 7), include:**

- Remove the “visibility exception”
- Limit the “visibility exception,” as other states have done, by:
  - Limiting ability to require modifications to a solar energy system (for aesthetics) that exceed a certain cost; or
  - limiting required modifications (for aesthetics) that reduce the operating efficiency of the system